

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MICHELLE A. TASSEFF, as Executrix of the
Estate of JOSEPHINE EWING,

Plaintiff,

vs.

21-CV-732

DANIELLE KWAKYE-BERKO, M.D.,
ALFREDO RODES, M.D.
WNY MEDICAL, P.C.,
CHRISTOPHER BIONDOLILLO, M.D.,
NEIGHBORHOOD HEALTH CENTER,
NORTHWEST BUFFALO COMMUNITY
HEALTH CENTER,

Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between Michelle A. Tasseff, as Executrix of the Estate of Joseph Ewing, (“plaintiff”) and Christopher Biondolillo, M.D., Neighborhood Health Center, Northwest Buffalo Community Health Center, (collectively, “federal defendants”), and Danielle Kwakye-Berko, M.D., Alfredo Rodes, M.D., and WNY Medical, P.C., collectively, (“the non-federal defendants”), by and through their respective attorneys as follows:

1. On February 23, 2021, plaintiff filed a Complaint with the Erie County Clerk in which she alleged, inter alia, that defendants were negligent in the care and treatment of plaintiff’s decedent. Plaintiff seeks money damages based upon such alleged negligence.

2. The Health Resources and Services Administration (HRSA) deemed Northwest Buffalo Community Health Center to be an employee of the Public Health Service for all times relevant to this Complaint, and Northwest Buffalo Community Health Center, Neighborhood Health Center and Christopher Biondolillo were thereby deemed to be employees of the United States Public Health Service within the exclusive remedy provision of 42 U.S.C. § 233(a).

3. 42 U.S.C. § 233(a) makes exclusive the remedy against the United States, as provided by 28 U.S.C. § 1346(b) and § 2672 damages for personal injury resulting from performance of medical surgical related functions ... by any employee ... of the Public Health Service while acting within the scope of his office or employment. 42 U.S.C. § 233(a) provides that, “upon a certification by the Attorney General that the defendant was acting within the scope of his employment at the time of the incident out of which the suit arose, any such the civil action or proceeding shall be deemed a tort action brought against the United States under the provisions of this Title 28 and all references thereto.”

4. On June 8, 2021, the United States Attorney for the Western District of New York certified that Christopher Biondolillo, M.D., Neighborhood Health Center and Northwest Buffalo Community Health Center, were acting within the scope of their employment with respect to claims alleged in the Complaint.

5. On June 14, 2021, this action was removed to this Court.

6. Under 42 U.S.C. § 233(c), plaintiff’s claim against Christopher Biondolillo, M.D., Neighborhood Health Center and Northwest Buffalo Community Health Center,

should be “deemed a tort action brought against the United States” as to the claims alleged against them in the Complaint.

7. At the time the complaint was filed, plaintiff had not presented her claim to the appropriate Federal agency and her claim had not been finally denied by the agency in writing.

8. Plaintiff did not exhaust her administrative remedies as required by 28 U.S.C. § 2675, and this Court lacks subject matter jurisdiction requiring dismissal of the claim.

WHEREFORE, it is stipulated and agreed that an order may be entered

1. substituting the United States as the proper defendant in the place of Christopher Biondolillo, M.D., Neighborhood Health Center and Northwest Buffalo Community Health Center, with respect to claims alleged against them in the Complaint;
2. all claims against the United States are hereby dismissed without prejudice;
3. this case is remanded to New York State Supreme Court.

Dated: July 21, 2021

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